No. 12,158

IN THE

United States Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation, MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, et al.,

Appellees.

Reply of Appellants to Briefs of Appellees

THURMAN ARNOLD,
1200 Eighteenth St., N. W.,
Washington 6, D. C.,

FRANK BUREN,
2466 East 56th Street,
Los Angeles 11, Calif.,

STERLING CARR,
One Montgomery Street,
San Francisco 4, Calif.,

Attorney for Appellants.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

STATUTES

Pages

OTHER AUTHORITIES

No. 12,158

IN THE

United States Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation, MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, et al.,

Appellees.

Reply of Appellants to Briefs of Appellees

Two Briefs have been filed by appellees, one by the group headed by the Borax Consolidated, Ltd. and the other by the American Potash & Chemical Corporation. Pursuant to the order of this Court, we shall answer these Briefs separately but include such two answering briefs under one cover.

ANSWERING THE BRIEF OF THE BORAX CONSOLIDATED, LTD. GROUP

I.

The Present Case Is Not Controlled by the Decision of This Court in Burnham Chemical Co. v. Borax Consolidated, as Alleged on Page 2 of the Brief Now Being Answered.

Throughout their Brief, counsel continually refer to the Burnham case as though the present grew out of an exactly similar situation, which is not the fact.

The Burnham case came to this Court after a trial on the merits so far as the statute of limitations is concerned. Upon the plea of the statute being raised by the defendants in that case, the lower court sent the case to a jury on that question alone, and, after hearing plaintiffs' case, granted the motion for judgment. Pursuant to such order of trial, an answer raising the statute was filed by the defendants, a jury was impaneled and witnesses called and examined and cross-examined, so that when the case reached this Court, it did so in a manner similar to that present in a straight trial on a question of fact.

Here, there was no such trial in the lower court. The complaint here alleges the facts, and to which complaint appellees filed a motion to dismiss and a motion for summary judgment—something utterly different from a trial upon the merits as was the fact in the Burnham case. By so doing appellees admitted all of the allegations of the complaint well pleaded (Appellant's Opening Brief, pages 3 and 48). Here, counsel constantly refer to questions of fact presented by their affidavits in support of their motion for summary judgment, exactly as though this case had also gone to a jury, and a large part of their Brief is directed to a discussion of such facts exactly as though a judgment on the merits had been rendered by the lower court and such judgment attacked on the ground that it was not supported by the evidence. The

purpose of counsel in so proceeding is evident, namely, to attempt to escape the admission of the allegations of the complaint which they are compelled to make in the face of their motion to dismiss and for summary judgment.

Once determined that the complaint herein states a cause of action, all of the contentions made by appellees on pages 4 to 30 inclusive of their briefs fall, for by their motions they admit themselves out of court. Furthermore, affidavits filed in support of a motion to dismiss or for summary judgment cannot be used to contradict the allegations of the complaint. (Also, see page 48, our Opening Brief.)

Different situations and different rules of law are presented herein from those arising in the *Burnham* case. It makes no difference whether or not the facts alleged in the affidavits as filed remain uncontradicted by the other party to the litigation, for contradicted or uncontradicted, they form no defense as against the allegations of the complaint. Appellees' admissions of such allegations stand controlling as against them, and they cannot escape by a welter of words and charges in affidavits. They are entangled in the meshes of their admissions and their only hope of escape is by pleading to the merits and a trial thereon.

Appellees attempt, through their affidavits, to try the merits of the cause on these motions and without the right of appellants to cross-examine the witnesses presenting the facts alleged in such affidavits. Even the documentary evidence referred to in such affidavits would be susceptible to examination and criticism and the court would be required to pass upon the facts raised by the complaint and the attempted denials or avoidance set forth in the affidavits. The attempt and purpose is to deny the allegations of the complaint by these affidavits—in some places by direct denials of such allegations and in others as a confession and avoidance of the alleged facts. This cannot be done and such procedure is wholly improper. The lower court fell into the trap set by appellees and directly passed upon many

of the questions of fact tendered through such affidavits. Permit us again to refer to our Opening Brief, pages 48 et seq., in which we set forth the law on this question and illustrate various instances where the lower courts did find upon the facts in violation of the law only to be reversed on appeal. In such subdivision we also point out to this court various questions of fact which are raised by such affidavits.

Appellees contend that in certain respects the documents attached to the affidavits show conclusively that the facts alleged in the complaint are incorrect, but no matter how apparent such situations may be to appellees the allegations of the affidavits are directly contrary to those of the complaint and on such motions as are here present, the court cannot accept as unquestionably true the statement set forth in such affidavits. The cases all hold, as shown in our Opening (p. 48) that an affidavit cannot be treated as proof contradictory to well pleaded facts in the complaint. Therefore, no matter how strong the allegations of fact may be in the affidavits they cannot, in the face of the allegations of the complaint, constitute the basis of a dismissal of such complaint. The cases cited in our Opening all illustrate the right of a plaintiff to prove his case in an orderly and proper manner and by the introduction of witnesses on his behalf and the cross-examination of those presented by the defendant so that his rights in his case may be thoroughly explored before the trial court. It will be noted that nowhere in the Brief of appellees do counsel question the rule that on a motion to dismiss or for summary judgment, all of the allegations of the complaint, well pleaded, are admitted. Nor do they contest the further rule that an affidavit cannot be treated as contradictory proof to the allegations in the complaint. On page 41 counsel again refer to the *Burnham* case and contend that the court will affirm a summary judgment despite allegations in the complaint; in such case, however, the statements referred to, both on pages 37 and 41 of appellees' Brief, overlook the fact that the facts referred to in the *Burnham* case were determined *upon a trial* in the lower court, and that such facts so

referred to by this court in its opinion (172 Fed.(2) 578) were such facts determined upon a trial. Here, there has been no trial—merely a motion and the mere say-so of counsel or defendants as to what the facts are does not rise to the dignity of a determination upon trial. To the contrary, such facts are admitted by appellees.

As to the Statute of Limitations Referred to on Pages 36-38 of Appellees' Brief

Of course, if the complaint alleges, without explanation, facts which show the cause in suit is unquestionably barred by the statute—a motion to dismiss may possibly reach such question, if the Statute of Limitations can be advanced on such motions (see later). But where, as here, the delay in bringing suit is tolled by the fraud and concealment of defendants, the California rule in reference thereto becomes operative whereupon there enters into the general factual situation presented, the question of whether or not fraud and concealment did exist and when the cause of action was actually discovered by the plaintiff. Such is also the rule of this court, as announced in the case of *Fleishhacker v. Blum,* 109 Fed.(2) 543, and cited on pages 69 and 70 of appellants' Opening and wherein it is held that the word "discovery" means "actual knowledge," or knowledge of facts which, in the exercise of due diligence, would have led to an actual discovery of the fraud — all of which are questions of fact. The cases cited on pages 69 to 73 inclusively of appellants' Opening are again respectfully referred to as demonstrating the questions of fact which are here presented by the allegations of the complaint and attempted to be overcome by the affidavits of appellees.

Counsel continuously endeavor to give the impression that the facts of the *Burnham* case and the present case, are on all fours but the reading of the complaints in the two cases will show that aside from the general allegations as to the historical features and the conspiracy and general fraud of defendants,

the facts of the two cases so far as wrongs suffered by the respective plaintiffs, are entirely different so that the references to the *Burnham* case and to some of the statements of this court as to the facts of such case cannot be applied as controlling in the present case.

As to Subdivision 5, Page 55, Appellees' Brief

Herein appellees claim that appellants received $600,000.00 under such release and set forth in appendix I a summary of the 1934 agreement. Such amount is entirely erroneous and the amount mentioned is grossly excessive. They make no mention, however, of the fact that the property conveyed to appellees, pursuant to the 1934 agreement, contained borax of the value of many millions of dollars and that none of such property would have been conveyed had appellants been aware of the formation of the 1929 conspiracy. These allegations are likewise admitted by appellees so that all that appears in such subdivision 5, as well as subdivision 6 immediately following, are mere discussions of the releases not permitted to be advanced on this hearing.

As to the Claim (P. 59) That the Appellants Seek to Go Behind Final Judicial Decrees and Judgments

Here again appellees attempt to raise and discuss questions of fact on these motions. The allegations of the complaint with reference to the multiple litigation in which appellees embroiled appellants constitute statements of overt acts performed pursuant to the conspiracy of 1929 and are all admitted by appellees to be such upon this motion. Therefore, no discussion of such litigation is proper at this time and so all of that portion of appellees' Brief, between pages 59 and 64, inclusive, has no place on this appeal. The complaint sets forth the facts concerning each of the seven proceedings referred to and designates them as overt acts. Appeals from the majority of the judgments entered in the lower courts were pending at the time of the making of the settlement of 1934. The fact that such agree-

ment provided for the entry of final judgments in such proceedings is immaterial for such steps formed a part of such settlement agreement and did not alter the original standing of such proceedings or of such settlement agreement as overt acts. What loss or damage was suffered by appellants through the entry of final judgments stands exactly the same as loss or damage suffered through any other overt acts; in this treble damage action appellants are not endeavoring to recover damages or relief through any of such actions referred to but by reason of their being overt acts in the conspiracy.

On page 61 counsel claimed that all of the judgments referred to are final, endeavoring to convey the idea that they became such as a result of legal determination of the controversies presented. That, of course, is not correct for such finality as such judgments possess, came as a result of the settlement of the controversies involved in the making of the 1934 agreement. They were all by stipulation and not by final court determination so do not possess the character sought to be given them by counsel.

The contention made on page 62 that the allegations of the complaint constitute a collateral attack upon the various judgments referred to is not correct, for in the complaint there is no attack, as such, upon any such judgment but instead a statement that all of such acts and proceedings and the activities of appellees pursuant thereto constituted overt acts performed pursuant to the conspiracy—all admitted by appellees on this appeal.

That the complaint herein states a cause of action is shown conclusively on pages 45 to 47, inclusive, in appellants' Opening Brief. In addition to the authorities there cited, please see the recent case of *Eastman v. Yellow Cab Co.,* 173 Fed.(2) 874, wherein it was stated on page 880 as follows:

> "Construing the complaint in the light most favorable to plaintiffs, we hold that it does state a claim under the Sherman Act upon which relief can be granted. *It is of course no valid objection that all of the relief asked for in the complaint and the amendments thereto cannot be granted.*"

See *Federal Trade Commission v. Cement Institute,* 338 U.S. 696, subdivision 4, where the *Stevens* case cited by appellants on page 46 is affirmed on the point that the complaint states a cause of action.

In further support of the rule laid down in the *Stevens* case (p. 46, Appellants' Opening Brief) as to the sufficiency of the allegations of the complaint, we ask permission to refer to *Louisiana Farmers, etc. v. Great A. & P., etc.,* 131 Fed.(2) 419, where it is held that a plaintiff is entitled to an opportunity to *attempt* to establish allegations of its complaint regardless of how improbable it may be that plaintiff can do so. This authority is also presented in our Opening in support of the contention that the lower court erred in refusing to allow appellants to amend.

On page 16 of appellees' Brief, counsel in an attempt to bolster one of their affidavits, call attention to the fact that in an answer filed by certain of the appellants in the proceedings at Los Angeles, it was alleged that appellants were informed and believed that on or about September, *1927* a certain conspiracy was formed by the appellees. Such attempt, however, is of no moment, for, in addition to the fact that such affidavits filed by appellees are not controlling in this proceeding as against their admissions of the allegations of the complaint, such allegation of appellants refers to a conspiracy of September, *1927,* while in the present action appellants refer to and base their cause of action upon a conspiracy formed by appellees in *1929*—the General Conspiracy referred to throughout the complaint (see p. 9 of appellants' Opening). Two different conspiracies and wrongs are referred to. Therefore, from a mere factual standpoint the conspiracy existing in 1927 is not the conspiracy complained of herein, namely, that of 1929.

II.

As to the Releases (Appellees' Brief, Page 31)

Appellants contended in their Opening Brief, page 82, et seq., that the question of the two releases urged by appellees on their motion to dismiss and for summary judgment, could not be brought to the attention of the Court on this particular proceeding, and could only be advanced as an affirmative defense, according to the direct provision of Rule 8(c) and the authorities cited by appellants. *Such rule is controlling in this particular proceeding and prevents the urging by appellees herein of such releases*—but in spite thereof, appellees have elected to ignore totally this Rule and the authorities cited and proceed to set forth various arguments concerning the facts of such releases, all of which, by the provision of Rule 8, must be ignored as having no place on a motion to dismiss or for summary judgment. Why the lower court elected to overlook Rule 8 and the authorities cited by appellants and to find directly on questions of fact involving such releases, is to us of course unknown, but the fact that the lower court did so act and did pass upon the facts is demonstrated by the order of such lower court, as shown on pages 82, et seq., of our Opening. Appellees totally ignore Rule 8 and then proceed, on pages 31 to 58, inclusive, to discuss the *facts* surrounding such releases, and in doing so attempt again to drag in the Opinion in the *Burnham* case, which, in view of the fact that there were no releases in such case, is entirely inapplicable.

On those pages devoted to the facts of the releases, appellees state themselves again out of court, even though it were possible to raise the question of such releases on these motions. They admit all the allegations of the complaint concerning such releases and the reasons that they were given by appellants, and then attempt to deny their own admissions by their affidavits. Subdivision C of Rule 8 provides in part as follows:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and

award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, *release,* res judicata, statute of frauds, *statute of limitations,* waiver, and any other matter constituting an avoidance or affirmative defense * * *."

In the light of such Rule all of the pages of appellees' Brief relating to these releases become but a tale "full of sound and fury, Signifying nothing."

III.

As to the Discussion Relative to Events Occurring After 1934 (Appellees' Brief, Page 64)

All of the points raised under this particular subdivision involve a discussion of facts—none of which can be properly presented on this appeal. On page 65, counsel claim that from 1934 to the last settlement in December 1942 only three overt acts occurred. This is not correct for as the complaint shows there was constant activity on the part of appellees subsequent to 1934, with the studied purpose and intent of eliminating the appellants. Just when this series of continuous acts began and when they separately ended is of course impossible of ascertainment, but the continuity of the same is apparent from the allegations of the complaint and even from the mouths of the appellees as expressed through their affidavits and motions. Again, counsel refer to $350,000.00 as received by appellants on the first settlement; that is an incorrect statement of fact for the actual payment was $150,000.00. The true facts are that the properties turned over to appellees by the two settlements of '34 and '42 were of great value, far exceeding the amounts received by appellants and extending to several millions of dollars. The continuous activities of appellees subsequent to '34 are similar to the facts appearing in the recent case of *Yurie v. Thompson,* decided by the Supreme Court on May 31, 1949 and appearing in 69 S.Ct. Reporter at page 1018. That case

involved a determination of when the statute of limitations began in a situation involving an occupational disease. The plaintiff alleged that he was a victim of silicosis and sued by reason of the damage resulting to him. The defendant plead the statute and the question of when the statute arose became pertinent. The Supreme Court held that the injured employee could be considered "injured" only when the accumulated effects of the dilatory substances manifested themselves. That is parallel in all respects to the present situation. Here the machinations and activities of the appellees continued right after the execution of the '34 agreement by which they put appellants out of business as to certain borax properties and activity on their part and immediately with the wicked thought in mind created by the conspiracy of '29 commenced their constant pressure and acts, all designed to the ultimate removal of appellants from all borax activities and as competitors of appellees. It would be impossible to determine and subsequently allege each act of appellees as an overt act for they were interwoven and continuous; the only comparison would be the steady development of damage once the trade disease commenced in the *Yurie* case. The accumulated efforts of such activities of appellees did not finally come to a head until December 1942 when appellees succeeded in eliminating appellants from the competitive field. We respectfully request close attention to the *Yurie* case for we believe it most pertinent to the facts of the present litigation. It is the best illustration of what really happens in one of these treble damage cases when the defendants cannot eliminate their competitors in one full swoop but must accomplish their results over a long period of time through constant pressure. Another illustration of such a situation is expressed in a case from this Circuit, namely, *Nye & Nissen v. United States,* 168 F.(2) 846. Certiorari was granted but, as we are informed, the case was affirmed. There the complaint details a description of the means by which the conspirators *planned* to impede the Government's inspection

functions. The *planning* of the wrongdoing was held sufficient to consitute a cause of action, just as here the *planning* of the appellees for the destruction of appellants is the same character of wrongdoing held to be sufficient in the *Nye* case. Twice the Supreme Court has held that the statute runs from the last overt act during the existence of the conspiracy. Once in *Fiswick v. United States,* 329 U.S. 211, and earlier in the leading case of *Brown v. Elliott,* 225 U.S. 392, and cited in Point III of Appellants' Opening Brief at pages 59 and 60. The last overt act in the period from '34 to '42 was the making of the settlement agreement of '42, and therefore the statute did not begin to run according to the cited authorities until the completion of such last overt act.

In Subdivisions (c) and (d) of such Point II, counsel again resort to the 1942 release in an endeavor to escape liability. They never seem to give up hope that such release cloaks them against liability and in such desire forget and pass over entirely the provisions of Rule 8 heretofore set forth. Counsel have argued with great vehemence the effect of the 1942 release and set forth in R. pages 413 et seq. We contend that this very release shows on its face the fraud and concealment practiced and intended to be practiced by the British appellees upon the appellants herein. The release is in general form but *makes no reference of any kind whatsoever to any claims growing out of violations of the antitrust laws."* Counsel claim that what the appellees were trying to do was to buy their peace; they knew at that time of the general claims made by appellants that appellees were violators of the antitrust law under a conspiracy of *1927* (not of 1929), and yet made no specific reference to any such claims in the releases in question. They refrained from including any mention thereof in the releases, evidently for fear of calling such claims to the attention of appellants. Appellees also knew of the formation of the '29 conspiracy and that appellants were ignorant thereof. The fact that no mention thereof was made in the releases shows conclusively the

desire and intent on the part of such appellees to conceal and attempt to cover specific unnamed violations by a general release. This certainly was an attempt to buy peace by chicane—evasion of the real issue. Likewise, in the '42 release specific reference is made to damages resulting from the operations of the mines by appellee Pacific Coast Borax Company and the releases of other specific claims in connection therewith are included, but no specific release from any antitrust charges which appellants might have made against such appellees. Such an omission clearly shows concealment; appellees endeavored to cover by their general and very broad recital of "claims known or unknown, valid or invalid," and by other like phrases, the charges of violations of the antitrust laws made by certain of the appellants against them. Had such appellees been acting honestly they would have set forth specifically in the releases such character of claims.

The 1942 release is similar to that presented in *Vines v. General Outdoor, etc.,* 171 F.(2) 487 (2d Cir.). There the court held (Subdv. (12)) as follows:

> "Advertising solicitor's release of all claims of any kind against employer, particularly claims for salary, commissions, or compensation under employment contract, did not inevitably release claim of which solicitor was then ignorant based on employer's withdrawal of one of solicitor's accounts pursuant to agreement in violation of Anti-Trust Acts. Clayton Act, Sec. 4, 15 U.S.C.A. Sec. 15."

By the above discussion as to the facts of the release, we do not intend to waive our contention that any consideration of the releases is improper due to the provisions of Rule 8.

In subdivision (1) on page 71 counsel enter into a discussion of the allegations as to damage in the present case and makes the general claim that unless damages are alleged specifically the complaint does not state a cause of action. Among such claims of counsel is the following: "General allegations are insufficient" and that the complaint must set forth facts from

which damages are logically and legally inferable and must do so with definiteness." Such is not the rule in treble damage cases. See *National, etc., v. Kelling, etc.,* 61 Fed. Supp., p. 76, D.C. N.D. Illinois, where it was held: (Subdv. (18))—

> "General allegation of damages, in action for violation of anti-trust laws was sufficient as against motion for bill of particulars, since element of damage was a matter of proof on the trial and could be best determined by interrogatories, or by depositions. Sherman Anti-Trust Act Sections 1-8, 15 U.S.C.A. Sections 1-7, 15 note; Clayton Act Sec. 3, 15 U.S.C.A. Sec. 14."

Also in *Rivoli, etc., v. Loew's, etc.,* 7 F.R.D. 219, on page 222 the court said:

> "* * * If the conspiracy to monopolize is sufficiently charged, the law is met by a general statement of damages by reason thereof. Wheeler-Stenzel Co. v. National Window Glass Jobbers' Ass'n, 3 Cir., 152 F. 864, 10 L.R.A. N.S., 972. Directly applicable is the language of the Supreme Court in C. E. Stevens Co. v. Foster & Kleiser Co., 311 U.S. 255, 61 S.Ct. 210, 213, 85 L.Ed. 173, that: 'The conspiracy, with its effect on interstate commerce, is alleged to have caused the petitioner great expense and loss of profits; to have restrained and prevented * * * "all to the great injury and damage of the plaintiff." * * * While these allegations are general, we cannot say that they are inadequate * * *.' "

Practically the same allegations are present in the instant case as those in the *Rivoli* case, as well as in the *Stevens* case cited and quoted in the *Rivoli* case.

Counsel contend in this subdivision that the complaint must set forth facts from which damages are logically and legally inferable, and that it must do so with definiteness, citing such cases as *Keogh v. Chicago, etc.* Such references are not pertinent here especially in the face of the definite allegations in the complaint of the overt acts alleged, all of which are claimed to have caused damages. The purpose of appellants in setting forth so fully in their Opening Brief the allegations of the

complaint was to demonstrate the actual statement therein of the activities of appellees. See page 4, Opening Brief, paragraph 64, wherein the purposes of the conspiracy are set forth in full, showing the *planning and intent* of appellees and bringing this case under the rule announced in *Nye & Nison v. United States* and *Yurie v. Thompson, supra.* Thereafter, in our Opening Brief follows a specific statement of the allegations of the complaint and of the activities of appellees and on pages 19 et seq., are set forth the overt acts performed and carried out by the appellees pursuant to the conspiracy. We call particular attention to this portion of the complaint for here is set forth in detail the specific allegations of the wrongs performed; to subdivision C on page 21 wherein is related the history of the bankruptcy proceeding and the charges that such was commenced and brought about through the fraud of appellees or some of them. Nothing could be more definite than the charges made in such paragraph 83 of the complaint; such allegations form the basis of the charges of paragraph 84 appearing on page 26 of our Opening, wherein it is alleged that due to such bankruptcy proceeding and to each and every activity of appellees referred to in the preceding paragraph, *the appellants herein were destroyed financially* and were left without means or opportunity to further engage in the borax business or its activities. Therein is a specific and definite statement that damages resulted to appellees from the performance of the overt acts set forth in the preceding paragraph. The subsequent portions of the complaint, as set forth in our Opening Brief, describe in particular all that is required in such a treble damage action as the present, according to the authorities. In addition, appellants set forth on pages 40 et seq., of their Opening, "The Admissions of Appellees," among which is the statement that due to the activities of appellees appellants were damaged in the sum of $5,000,000.00. Under the rule in anti-trust cases such an allegation as to damages is sufficient. See *National, etc. v. Kelling, Rivoli, etc. v. Loews* and also *Stevens v. Foster,*

et al., cited in the *Rivoli* case, all *supra.* In fact the allegations, when compared with those cited in the *Stevens* case, are much more specific. In addition, please note paragraph 91 of the complaint set forth on pages 33 and 34 and in which it is alleged that the general conspiracy was a fraud upon appellants and the purpose of which was the financial destruction of appellants. Also, please see paragraphs 92, 93 and 94 on page 34 of our Opening Brief.

The foregoing comments are applicable to subdivision 2, page 73 of appellees' Brief with the additional comment that such subdivision 2 deals with questions of fact such as whether or not there was ore in the mine as discussed on pages 74 and 75. The discussion of such facts is not pertinent upon these present motions nor is the rule of *Momand v. Universal,* cited on page 75, here applicable, for the reference of the complaint to the 1942 sale and contract is a specific damaging action.

Counsel endeavor in this portion of their Brief to raise and comment upon questions of fact—the same purpose as is present throughout their Brief. They attempt to escape the rule against the presentation of facts on these motions by constantly referring and discussing them hoping that ultimately they may persuade the mind of this court to overlook the rule against factual discussions in such proceedings as the present. We respectfully request this court not to be lured by any such siren song as was, we believe, the fate of the lower court. The rule as to facts on these motions is perfectly clear and established and by reason thereof a motion for summary judgment cannot be turned into a trial upon the issues presented, nor can the affidavits filed in support thereof contradict the allegations of the complaint.

We respectfully submit that the lower court grievously erred on this point alone, sufficiently so to warrant the reversal of this case.

IV.

As to the Claim That the Court Below Did Not Err in Refusing to Permit Appellants to Amend

Strictly speaking, the motion in question was not a motion to amend the complaint but *one for an order amending the judgment* by adding a paragraph thereto "that, plaintiffs above-named, may, if they so elect, *move this court for an order* permitting them to amend their complaint, etc." Naturally, no suggested amendment to the complaint was served with such motion by reason of the fact that appellants could not make such motion without the preceding amendment of the order of the court permitting them so to do. The present situation is parallel to that cited in *Market v. Swift,* 173 F.(2d) 517 [2nd Cir.] wherein the court states on page 519 "technically, the judgment of dismissal should be re-opened before an amendment to the complaint is granted. Such relief can be sought within ten (10) days under Federal Rules of Civil Procedure, Rule 59, 28 U.S.C.A., and then the running of the appeal time F.R. 73(a) is automatically suspended." By reason thereof all that is said by counsel as to the failure to submit a suggested amendment falls of its own weight. The propriety of the suggested amendment and the right to file the same could not be presented until after the court had amended its order permitting such action on the part of appellants; we re-affirm the statements and authorities set forth in our Opening at pages 84 to 87 inclusive. Especially is this so in view of the fact that in its opinion the lower court referred in several instances to the failure of the complaint to allege various facts which the lower court deemed necessary. Due to the fact that a motion to dismiss has taken the place of a demurrer and that the practice had always been to permit corrections in a complaint after the sustaining of a demurrer, there would seem to be absolutely no reason whatsoever why appellants should not have been granted such a right. In fact, common justice would seem to require the same. The present Rules of Civil Procedure, particularly Rule 15(a), lay down a general policy as to amend-

ments when they provide "and leave (to amend) shall be freely given when justice so requires." In view of the criticisms of the lower court as to the complaint we respectfully submit that justice required the granting of a right to amend to enable appellants to overcome the objections to the complaint suggested by the lower court. It has been the general practice of these courts for years to give plaintiffs every opportunity to state properly a cause of action, and the fact that plaintiffs may have previously filed two short amendments to the complaint, one as a matter of right and another by permission of the court not objected to by counsel, is immaterial as against the present facts.

This cause is of great importance to appellants and we respectfully submit that if there were any deficiencies in the complaint in the manner referred to by the lower court appellants should have been given the right to present at least their suggested amendments; it was an abuse of discretion to refuse to amend its order to such extent. Such refusal is so far afield from the usual and general practice as to call for relief from this court.

The question of the moratorium referred to on page 66 of appellees' Brief and the applicability of a plea of the statute of limitations on a motion to dismiss and for summary judgment will be discussed in our reply to the brief of American Potash and Chemical Corporation.

V.

As to the Contention Re Rasor's Estate

On page 78 counsel refer to the motions of Bank of America as Executor of Rasor's estate. This point has no place on this appeal for no ruling was made by the lower court on the motion referred to and no appeal was taken by any party from the failure of the lower court so to do. Therefore, the thoughts expressed by counsel are purely gratuitous and have no basis on this appeal whatsoever. Nevertheless, counsel engage in another discussion of facts concerning this contention; it would not be possible without evidence produced on a trial to determine whether or not Rasor's estate gained by his activities. In addition, it makes no difference whether such estate gained or

not so far as this conspiracy is concerned for if Rasor did not benefit financially, he certainly was a party of the conspiracy as alleged in the amendment and is therefore liable. The points of law raised are settled by the following authorities, viz:

United Copper Sec. Co. v. Amalgamated Copper Co. (2d Cir.), 232 F. 574.

There it was held:

> "Where recovery for the results of a monopolistic conspiracy is sought under Sherman Act, Sec. 7, the action will survive against the estate of decedent, in case he secured some benefit at the expense of plaintiff."

The Circuit Court of this Circuit in *Hicks v. Bekins etc.,* 87 F.2d 583 (9th), held that an action to recover treble damages for violation of the Sherman Act is not an action to recover a penalty and survives the death of the injured party and is assignable. This demonstrates conclusively that a Sherman Act suit is not a tort action as claimed by counsel for a tort action does not survive.

Counsel further attempt to divide the Bank of America into two parts: one for Northern California and one for Southern California; but there is no merit in such claim for the Bank is one corporation throughout the state, the home office of which is in San Francisco. Rule 4(f) covers this situation and when such rule is read in connection with Sec. 113, T. 28 U.S.C.A. and Sec. 15, T. 15 U.S.C.A., the claim that the District Court of this district has jurisdiction is unquestionable.

This whole Rasor situation is an attempt to turn this Court into a *nisi prius* forum—a suggestion that this Court enlarge its own jurisdiction. Such purpose falls in its own statement.

CONCLUSION AS TO BRIEF OF BORAX CONSOLIDATED, LTD., ET ALS.

Appellants respectfully submit that:

1. The *Burnham* case came to this court after a trial of the facts of the statute of limitations and the rules applicable to

such a record are entirely different from those applicable to the present record based upon the complaint and the two motions. Accordingly, the rules announced in the *Burnham* case have no application to the present situation.

2. Questions of fact cannot be determined by the court upon such motions presented herein. All that can be determined (from the complaint and the motions) is whether or not a question of fact exists; if so, the motions to dismiss and for summary judgment must be denied. Here the record discloses without contradiction that the lower court directly passed upon facts presented by such motions and their supporting affidavits and in so doing erred to the extent of requiring this court to reverse.

3. A consideration of the two releases urged by appellees is not permissible herein; first, because the Rules of Civil Procedure provide to the contrary and that any such defense of release must be set forth in a responsive and affirmative plea and, secondly, because such releases raise nothing but questions of fact which cannot be passed upon on the present state of the record.

4. The lower court erred in refusing to amend its order to the extent of permitting appellants to make a motion to amend their complaint.

5. The statute of limitations cannot be urged upon, or in support, of these motions. (Rule 8(e) is controlling.)

6. This is a case of a continuing conspiracy and the rule of *U. S. v. Kissel, supra,* is applicable.

7. The Statute of Limitations does not begin to run until the completion of the last overt act. (Hedderly v. U. S., 193 Fed. at 569—**(9th Cir.)**; *Fiswick v. U. S.,* 329 U.S. 211; *Brown v. Elliott,* 225 U.S. 392.)

By reason of the foregoing, it is respectfully submitted that the judgment of the lower court should be reversed.

REPLY OF APPELLANTS TO BRIEF OF APPELLEE AMERICAN POTASH & CHEMICAL CORPORATION

As to the Summary of Argument (Pages 2-4)

Again counsel refer to the *Burnham* case as conclusive on this appeal and again we answer with the same contentions as set forth in the first portion of our reply to the brief of the British defendants. The same issues as presented on the Burnham record are not presented herein and counsel grievously err when they so state on page 2 of their brief, that the principal issues presented by this appeal have already been considered by this Court in the *Burnham* case. Likewise, on page 3 where counsel allege, "although the District Court relied upon the Burnham decision as dispositive of most of the issues presented by appellants and repeated here, appellants completely ignore this Court's decision." Such a statement is incorrect. Not only because the record herein presents issues entirely different from those in the *Burnham* case but also because this Court in the *Burnham* case did not pass directly upon some of the legal issues presented on that appeal.

The questions referred to by counsel on page 4 all have to do with *factual* situations which cannot be considered on this appeal.

I.

As to the Claim That the District Court Properly Held That the Action Was Barred by the Statute of Limitations and That Such Statute Might Be Properly Raised by a Motion to Dismiss.

Counsel admit (on p. 5) the authorities cited by appellants on this point in their Opening and in turn cite four different Circuit Court cases, not one of which was an antitrust case and not one of which discusses specifically Rule 8(c) which provides specifically that the Statute of Limitations must be pleaded as an affirmative defense, and providing:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, dis-

charge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, *statute of limitations,* waiver, and any other matter constituting an avoidance or affirmative defense."

Here is a definite, distinct and unqualified rule and if the wording thereof means anything it is that the plea of the statute must be presented by an affirmative defense and not by way of motion. The authorities cited by counsel, as well as their own claims, have to do with Rule 12(b) and assert that the right to plead the statute on a motion arises under Subdivision (6) reading, "failure to state a claim upon which relief can be granted"; no reference whatsoever is made to Rule 8(c) where the pleading of the statute on a motion is absolutely prohibited. Inasmuch as Rule 8(c) specifically includes the Statute of Limitations and directs how it shall be advanced, such rule dominates and leaves no reason or right to eliminate it by an implied inclusion under Subd. (6) of Rule 12 which does not even mention the statute.

In addition to the authorities cited by us on this point (Our Opening Br. pp. 79-81), permit us to refer to the following cases which have come to our attention since the filing of our Opening:

Wilson v. Seas Shipping Co., 78 Fed. Supp. 464 (Penn.), holds definitely that the question of a statute of limitations may not be raised on a motion to dismiss, citing *Kranshaar v. Lesching,* 4 F.R.D. 143, and *Carlisle v. Kelly,* 72 Fed. Supp. 326; also, *Zimmerman v. Poindexter,* 78 Fed. Supp. 420 (Hawaii). In that case both a motion to dismiss and one for summary judgment were based on the ground of the Statute of Limitations. The court held that so long as the summary judgment called for a determination of a question of fact involving the tolling of the statute, the question of such statute could not be raised on a motion to dismiss. Such is the present case, for here a question of the tolling of the statute arises which must be determined

as an issue of fact on both the motion to dismiss and for summary judgment and, therefore, it is not permissible for appellees to urge such statute in support of such motions.

This is a very important point and one which has not been passed upon by the Supreme Court, and we therefore respectfully request a direct ruling by this Court upon such question. If this Court holds that Rule 8(c) is controlling, all of the contentions made by counsel as to the Statute of Limitations must be denied and the judgment of the lower court reversed. The *Burnham* case did hold that the statute was applicable to the facts presented therein but such ruling was made after a trial of the facts on the merits and before a jury. Therefore, the point presented in the *Burnham* case is entirely distinct from that herein presented.

As to the Claim That the Complaint Showed on Its Face That the Action Was Barred by the Statute (Page 7)

The action was not barred by the three-year statute because the complaint does show on its face that the action came within the exceptions permitted in the California statute by reason of the fraud and misrepresentation of the defendants; also by the Moratorium which we shall hereafter discuss. As shown in our Opening Brief, the California rule and the statute provide that where there is fraud or concealment the statute does not begin to run until the discovery of the cause of action. The authorities to that effect are set forth fully in our Opening Brief, commencing with page 67. Counsel deny that fraud or concealment are disclosed by such complaint but do not state in particular where the complaint is faulty in that respect, so that nothing but a reading of the complaint by this Court will place it in a position to determine such question. The allegations set forth in Paragraph 83 of the Complaint (page 19 our Opening), disclose the activities of appellees, particularly as to the bankruptcy proceedings appearing on page 21. Therein is set forth one of the most vicious and wicked attempts to put a company out of business

that can be imagined, and to read the story of such proceedings by which the Suckow Company was brought under the control of the Bankruptcy Court (all admitted by appellees) is to make one flare with indignation. Such is true of all of the steps throughout such bankruptcy proceeding; we submit that such proceeding alone completely puts to shame all claim that could possibly be made by counsel that no fraud or concealment exists in this particular case. The facts herein are so much more virulent and fraudulent than those presented in the *Burnham* case that there can be no comparison. Once a fraud or concealment is presented the wording and rule of the exception to the California statute immediately come into being, and the statute is tolled until the true facts are discovered as held to be the rule by this Court in *Fleishhacker v. Blum, supra.*

The commencement of the Government actions against most of these defendants in September 1944 placed appellants on notice.

On page 10, counsel cite from the opinion of the District Court (R. 619) a statement that a mere denial of a violation of law does not constitute a concealment upon the injured party and that the statute is not tolled thereby. To any such rule that may exist there is the further rule that while a man so charged may not be required to answer, still if he does elect to do so he must reply truthfully and state the facts and his failure so to do constitutes fraud. See *Pashley v. P. G. & E.,* 25 Cal. (2) 226 at p. 235, and citing other California cases to such point. Here the Record shows (R. 477 et seq.) by the affidavit of Mr. Tobeler that when appellees were charged with being monopolists, A. W. Ashburn, one of their attorneys, wrote the Judge in Los Angeles a letter denying the charges of appellants that the British defendants were monopolists in any sense of the word. Furthermore, as shown (R. 478) in such affidavit, the British appellees again denied in an answer and cross-complaint which they filed the fact that they were a monopoly. This in the face of the fact that subsequently in 1945 and in the Government

suits pending in this District they pleaded *nolle contendere* to the charges of the Government and paid a large fine by reason thereof. Therefore, we submit that appellees are within the exception to the California statute even if the question of such statute can be raised on such motions as are here presented.

II.

As to the Claim That the District Court Did Not Err in Dismissing the Complaint on the Motion for Summary Judgment (Page 11)

Under such point it is claimed that the District Court properly ruled that the affidavits and exhibits established that there was no genuine issue of fact to be tried. That is not a correct statement of the situation for there is not one word to such effect in the opinion and judgment of the Court. No reference is made to the affidavits or the pleadings as not raising genuine issues of fact to be tried. The lower Court never passed upon such point. It is impossible to deny with good faith that the affidavits and pleadings presented herein do not raise issues of fact, so all of the authorities cited on pages 12 and 13 of counsel's brief are inapplicable. Furthermore, counsel make only general allegations and fail to point out in what respect the complaint is guilty of conclusions of law. In our Opening Brief (pp. 49 et seq.), we set forth the specific instances of questions of fact raised by the affidavits and cite the authorities in connection therewith. The rule laid down by this Court in *Detsch v. American, Etc.,* 152 F.(2) 473, is controlling herein. No criticism is made by counsel of the authorities cited by appellants; such authorities must therefore be taken as admitted.

As to the Claim That the District Court Properly Ruled That the Facts Established There Was No Fraudulent Concealment (Page 14)

We find no such specific ruling on the part of the lower Court, and counsel cite no portions of the opinion in support of any such statement. The rest of this subdivision is a discus-

sion of the facts alleged in certain of the affidavits of appellees filed in support of their motions and which, pursuant to the authorities cited in our Opening, is not permissible on such an appeal as the present.

In passing, however, we might add that the quotations from various pleadings referred to on pp. 14-17 of counsel's brief had reference to a conspiracy of *1927,* not to that of 1929. Counsel complain because we do not quote from the reply affidavits of Mr. Tobeler and Mr. Buren (R. 484; R. 570), explaining the use of the words "Borax Trust" and other similar charges. This is an invitation to enter into a discussion of the facts, which have no place on these motions and which invitation we decline.

III.

As to the Claim That "The Moratorium Act of October 10, 1942 Is Not Applicable to Suits by Private Parties" (Page 17)

Herein is another claim by counsel that the statute in question does not mean what it clearly states. Similar to the claim previously made by counsel that the wording of Rule 8(c), wherein it is provided that the plea of the statute of limitations must be made by affirmative allegations and cannot be presented on a motion to dismiss, does not mean what it plainly states.

The contention that the Act of Congress imposing a moratorium upon "the running of any existing statute of limitation applicable to the violations of the antitrust laws of the United States," does not apply to private suits for triple damages is quite without foundation. The argument by the appellees, which presumes to separate suits brought by the government from those instituted by private persons, where the Congress has made no such separation, is beset with error. It runs in the face of established principles of interpretation, neglects the situation which the statute was invoked to redress; ignores the rationale which shaped the provisions, omits important parts of the legislative history, and for the plain words of the Act sets down

inferences arrived at by illogical deduction. The contention demands criticism and correction in some detail.

1. NO EXTENDED GLOSS IS NECESSARY TO MAKE CLEAR THE MEANING OF THE ACT.

The salient words are applicable to violations:

> "The running of *any existing statute of limitations applicable to violations of the antitrust laws of the United States,* now indictable or subject to civil proceedings *under any existing statute* shall be suspended" * * *

as amended "until June 30, 1946." This language speaks for itself, without benefit of any gossamer web of interpretation. The terms in which it is written are as inclusive as the Congress could make them. It is the running of "any existing statute" which is suspended. The suspension is in respect to "violations of the antitrust laws of the United States," not specific violations of particular antitrust laws. The "antitrust laws" have by the Congress been defined to include the Sherman Act, certain sections of the Wilson Tariff Act, as amended, and the Clayton Act. (See Act of Congress of October 15, 1914, 15 U.S.C. Sec. 12, commonly known as the Clayton Act, Section 1.) The only qualification is that the violations are now "indictable or subject to civil proceedings." A criminal indictment may be brought only by the government; a civil proceeding may be instituted either by the government or by a private party. And the prosecution or civil proceeding may be brought "under any existing statute." The antitrust laws in terms of function do three distinct things: they specify offenses against the law and set down penalties; they give standing to sue and make available causes of action to the government and to private parties; they confer necessary powers of enforcement upon the courts. In all the antitrust laws the right of suit for the private person is as clearly recognized as that of the government. In the moratorium statute every term employed is of inclusion; not a phrase or a word is used to indicate that the private action is to be excluded.

A general presumption of judicial interpretation is that the Congress is quite capable of saying what it means. The burden of showing that legislative intent is something different from legislative decree rests squarely upon the party who challenges "the plain and obvious meaning of the language." In the Sherman Act the Congress in separate provisions, because the causes of action are different, provides for suits by the government and by private parties. In the Clayton Act, it makes specific provision for the private triple damage action,[3] and goes so far as separately to assign to the Interstate Commerce Commission, the Federal Communications Commission, the Federal Reserve Board, and the Federal Trade Commission its own distinct sphere of enforcement.[4] In the Clayton Act, it sharply distinguishes the government from the private suit; provides that "a final judgment or decree" in a suit by the government, whether civil or criminal, "shall be prima facie evidence against the defendant * * * in any suit brought by any other party against such defendant"; and suspends the statute of limitations in private suits during the period the government is for the same offense taking action against the same parties. The Congress not only can—but in respect to the antitrust laws invariably does—distinguish between public and private actions when it desires to make a difference. But it does not follow that, if the Congress makes a distinction when a difference is intended, that it must maintain the distinction when the interest is that the public and private suits are to be treated alike.

The attempt of the respondents to amend the language of the statute by substituting their own inference for its words rests upon logical magic. They argue that "when Congress intended to suspend the running of the statute of limitations with respect to private suits, it was able to and did use clear language to accomplish its purpose." But, in Section 5 of the Clayton Act,

---

[3]Section 4, 15 M.S.C. Sec. 16.

[4]Section 4, 15 M.S.C. Sec. 4.

[5]Section 11, 15 U.S.C. Sec. 21.

it was only in respect to private suits, that the running of the statute was suspended. It distinguished, when it intended a difference; it does not follow that it had to distinguish when no difference was intended. It may be that an omission in a later statute of language used in a former, "is not to be attributed to oversight." But, again it does not follow that the use of the language to make a necessary distinction demands its use where no difference is to be made. The language of Mr. Justice Holmes in *Wheeler v. Greene,* 280 U.S. 49—even if it meant what it is said to mean—has not even a remote bearing upon the interpretation of the statute. If the Act makes no specific mention of the private suit, it makes no specific mention of the suit by the government. It is in fact silent—intentionally silent—about who it is that brings the suit. The statute is suspended in all cases "now indictable or subject to civil proceeding." The Congress, through deliberate search, could not have found broader or more inclusive words in which to write its mandate.

However, the questions raised by counsel are settled by the recent decisions of the Supreme Court in the cases *Ex parte Collett,* 69 S.Ct. 944; *Kilpatrick v. Texas, etc.,* 69 S.Ct. 953, and *United States v. National City Lines,* 69 S.Ct. 955. All of these cases are reported in Advance Sheet No. 16 of Vol. 69 and dated June 15, 1949. All three of these cases were decided on May 31, 1949.

In the *Collett* case, it was held that:

> "Legislative history need not be referred to in construing statute where statutory language is clear."
>
> "The plain words and meaning of a statute cannot be overcome by legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."
>
> "Legislative history of section of revised judicial code providing that for the convenience of parties and witnesses, in the interest of justice, a District Court may transfer *any civil action* to any other district or division where it might have been brought, failed to reveal that Congress

intended that actions under Federal Employers' Liability Act should be excluded therefrom."

On page 947, the court said:

"Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of Sec. 1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' Gemsco v. Walling, 1945, 324 U.S. 244; 260, 65 S.Ct. 605, 614, 89 L.Ed. 921. This canon of construction has received consistent adherence in our decisions." Citing cases.

Applying this ruling to the present discussion: The statute in question herein is plain and clear, and is in part as follows:

"The running *of any existing statute* of limitations applicable to violations of the antitrust laws of the United States, now indictable *or subject to civil proceedings under any existing statutes,* * * *."

The words "under any existing statutes" are exactly similar to the words "any civil action" present in the *Collett* case. On page 946 of such case, the court states:

"The court below relied on the language of Sec. 1404 (a), supra, which it regarded as "unambiguous, direct, clear." We agree. The reach of "any civil action" is unmistakable. The phrase is used without qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from "any civil action."

The following paragraph of the opinion discusses with particularity the contention of counsel in such case and which the Court will find interesting in its comparison to the situation presented herein. This *Collett* case involved the Federal Employers' Liability Act.

The *Kilpatrick* case also involved the same Act, while *United States v. National City* involved the antitrust laws. On page 956, the Chief Justice states:

> "The issue here is whether the 1948 revision of the Judicial Code, Title 28, United States Code, 28 U.S.C.A. Sec. 1 et seq., extends the doctrine of *forum non conveniens* to antitrust suits.

The Court held in the affirmative so that we already have a decision of our highest court to the effect that the construction established in the *Collett* case will be applied to antitrust litigation.

2. THE LEGISLATIVE HISTORY OF THE MORATORIUM STATUTE REMOVES ALL DOUBT THAT IT WAS INTENDED TO APPLY TO PRIVATE AS WELL AS TO PUBLIC SUITS.

If counsels' statutory interpretation is pretentious imagination, their legislative history is a distorted record. It is incomplete; the excerpts from debates and reports is selective; the objectives the statute was intended to serve are withheld. It is clear that the Act of October 10, 1942, was meant to apply—so far as applicable—to government suits. It does not follow that it was not meant to apply to private suits. It did "protect the rights of the Government to proceed at a later date" (Res. Br. p. 47); it does not follow that it sacrificed the rights of private parties who, involved in the war effort, were then unable to prosecute their suits. It did "give the Department of Justice a greater length of time in which to prosecute these cases (Res. Br. p. 48); it does not follow that private suitors were not given as great a length of time. Its provisions mention neither government nor private party; the argument that the government was meant to be served does not prove that private parties were to be excluded.

A true account of the legislative history speaks for itself. It does not have to be fitted out with a host of inferences, logomachies, and false sequiturs to tell its story. This history is

marked by three pivotal events, the "gentlemen's agreement" between the Department of Justice and the military; the unsuccessful attempt to suspend the antitrust laws for the duration of the war; and the eventual passage of the compromise bill, the so-called moratorium, whose meaning is being questioned by the respondents here. Each of these, in its order, deserves brief discussion.

A. An informal arrangement, in nowise involving legislative action, was entered into on March 20, 1942, between the Attorney General on one hand and the Secretaries of War and Navy on the other. This arrangement, embodied in an exchange of letters,[6] was subject to the oversight of the President. By its terms, any antitrust suit brought—or about to be brought—by the government was to be suspended, or to be held in abeyance, if in the judgment of the Secretaries of War and Navy it threatened to interfere with the war effort. It was felt that the defense of antitrust suits imposed a heavy burden in time, attention and money outlay upon large corporations and their staffs; and that their executives particularly ought to be free to give their attention exclusively to the business created by war orders.

The gentlemen's agreement was made public; and full publicity was given to subsequent acts of the Department of Justice in arresting cases. The argument was faithfully lived up to by all parties to it. No charge has been made that the military took advantage of it to extend immunity where the war effort was not involved. And the Secretary of War is on record that in its practical operation, he had no complaint to make against the Attorney General. But, as the weeks passed, it became increasingly to be felt by the military that it was beset with two shortcomings. The first and less serious was that, because of its informal character, the Secretaries of War and Navy

---

[6]This arrangement is embodied in two letters dated March 20, 1942, copies of which may be found in No. 1592, 77th Cong. 2nd Sess. (1942); H.R. Rep. No. 2480, 77th Cong., 2nd Sess. (1942); and 10 U.S.L. Week 2621 (March 31, 1942).

could not give to manufacturers and munition makers assurance of the security they demanded against having to answer for previous violations of the antitrust laws. The second and more disturbing was the limited scope of the agreement. The Attorney General, in entering the agreement, could only bind himself and his Department; he could not speak for, or swear away the rights of private parties given by law standing to sue for violations of the antitrust acts. And private suits for triple damages, predicated upon exactly the same violations for which the government could go into court, involved the same vexation, the same time-consuming, the same preparation of an endless sequence of documents as suits brought by the government. It was a more formal arrangement and security against being harassed with private suits which actual and potential war contractors voiced to the Secretaries of War and Navy. These protests impelled the military, with the Secretary of War in the lead, to ask the Congress to meet the situation with appropriate legislation.

B. Accordingly a bill was drawn, under the direction of Robert Patterson, the then Secretary of War, which is set forth in full in the margin.[7] The bill was not primarily designed to arrest the government's action; that had already been accomplished by the gentlemen's agreement which was then working smoothly. It was intended essentially completely to arrest

---

[7]A Bill to suspend the operation of the antitrust laws and Federal Trade Commission Act in certain instances requisite to the prosecution of the war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the Chairman of the War Production Board shall certify to the Attorney General in writing that the doing of any act or thing, or the omission to do any act or thing, by one or more persons (during the period that this Act is in effect) in compliance with any written regulation, order, request, or approval of the said Chairman in which it is specifically set forth that such act, thing, or omission is requisite to the prosecution of the war, such specific act, thing, or omission shall not be deemed in violation of the antitrust laws of the United States or of the Federal Trade Commission Act, if the Attorney General shall find that the regulation, order, require, or approval is in effect an order or a direction requisite to the prosecution of the war, and is not an unlawful delegation of discretion to a private group.

actions by private parties, whether injured parties or stockholders. Accordingly, this bill did not concern itself with procedural questions, such as parties, standing to sue and limitation on actions. Instead, its thrust was directly at the law of antitrust. It suspended all those sections in the antitrust law which define and specify breaches of the law. It was intended to make legal conduct—such as restraint of trade—which heretofore had been illegal. The technique of the bill was not to sterilize the party plaintiff, whether government or private person; it was rather to confer upon the defendant—actual or potential—immunity to the law. Thus the change in the substantive law would give security against suit from any quarter. The condition was that the corporation which sought its benefits should submit a plan of operation to the military for approval and should conduct itself in accordance with the plan to be submitted. Note the breadth of the immunity granted; the bill went beyond the gentlemen's agreement to stop private triple damage as well as public suits.

The bill (S. 2431, 77th Congress)—about which the respondents are strangely silent—was sponsored by the Attorney General and by the Secretaries of War and Navy. The close scrutiny of its provisions and the full debate leave no doubt of the objectives it was meant to serve. A passage between Mr. Sumners, the Chairman of the Judiciary Committee of the House, and Mr. Francis Biddle, the Attorney-General, in respect to what the gentlemen's agreement did not yield, and what the proposed bill offered, is in point.

> Mr. Sumners: "Let me ask you this question, Mr. Attorney General. Even if these agencies or these persons would get what you would give under the pressure of public necessity, a sort of clearance, is it considered that that would protect them against private prosecutions by persons who claimed they had been injured by the violation?
>
> Mr. Biddle: "No, I do not think so.
>
> Mr. Sumners: "That requires this sort of legislation to cover that kind of cases?

Mr. Biddle: "Yes.

Mr. Sumners: "Or some sort of legislation to cover treble damage claims, and so forth?

Mr. Biddle: "Yes, it is necessary, no doubt about that."[8]

The Secretary of War also appeared as a witness, and was even more specific than the Attorney General as to the real necessity which prompted the bill. He was insistent that the proposed legislation should in nowise be confused with the informal arrangement then in use. If, under the proposed bill, there was to be immunity from the antitrust laws, it would not be in respect to voluntary conduct, but under the oversight of the authorities. As Mr. Patterson put it:

> "That arrangement relates to pending and prospective cases where the defendants are alleged to have violated the law of their own volition and without any direction or authority from an authorized Government department or agency. In such case no defendants are to be exonerated and the trials are to be, at the most, postponed during the war because the full time and attention of the defendants are required in the war effort.
>
> "As the President has said, the war effort comes first.
>
> "The proposed legislation is complementary to the arrangement of March 20. It covers a related, but different aspect of the problem. It applies to current action of industry at the request or direction of the Chairman of the War Production Board, which action, if not so directed or authorized, might be in conflict with the antitrust laws. In such case the legislation exempts from prosecution and civil suit persons who act in compliance with governmental direction."[9]

Mr. Patterson makes it clear that the proposed bill is but a mere Congressional underwriting of the gentlemen's agreement; that it is "complementary" to, rather than identical with, the

---

[8]Hearings Before Subcommittee of the Committee on the Judiciary, United States Senate, S. 2431, May 28, 1942, 77th Congress, 2nd Session.

[9]Page 29, Hearings Before Subcommittee of the Committee on the Judiciary, United States Senate, S. 2431, May 28, 1942, 77th Congress, 2nd Session.

informal procedure then employed. And he is specific in respect to the new ground which is to be covered:

> "Furthermore, even if criminal prosecution were clearly eliminated by the clearance method, the industry involved might still be liable to civil treble damage suits under the antitrust laws or stockholders' suits of an harassing nature."[10]

and, as his colloquy with Senator O'Mahoney shows, it is not the suits instituted by the government about which he is concerned; on that front he has no quarrel:

> Senator O'Mahoney: "* * * Can you give us any example, or do you know of any case in which confusion has been created by the present process or in which delay may be attributed to the action of the Department of Justice under the present plan?
>
> Mr. Patterson: "No, sir. I am not critical of the present arrangement, except the obvious things that were mentioned by Mr. Biddle. The present arrangements do not do enough.
>
> "The present arrangements do not give the people entering them the slightest security against civil suits by private persons. Other than that, I have no criticism of it."[11]

To the same effect is a statement by Mr. William R. Boyd, Jr., Chairman of the Petroleum Industry War Council:

> "Personally I am very happy to know that all of the agencies of the Government are interested in obtaining for industry clearances from the danger of prosecution, the danger of treble damage suits which may ensue later on."[12]

And the character of the bill, and the theme of the proposed legislation were reiterated, without a voice in opposition in a three-way conversation between Senator Hughes, the Attorney General and the Secretary of War:

---

[10]Ibid., page 30.

[11]Ibid., page 37.

[12]Ibid., page 35.

Senator Hughes: "Mr. Chairman, it was just running through my mind that we have been laying some stress on these civil suits that some of us fear. How can that be met in this legislation?

Mr. Patterson: "This just says it does not violate the law. In those cases, that takes the ground out from under any stockholder who wants to start suit, no question about that.

Senator Hughes: "That is an expression by us that it does not violate the law, but I wonder how far they would feel safe in violating the law?

Mr. Biddle: "The treble damages are provided in the Sherman Act, and if the Sherman Act is modified, no one has any basis for bringing the suit."[13]

C. The Patterson proposal, S. 2413, was never enacted by the Congress. The legislative history reveals no opposition to the ends it sought to accomplish. There was, however, reluctance on the part of the Congress to grant immunity to a course of business conduct in violation of the antitrust laws, even though it was carried on in wartime and under the supervision of the War Production Board. Another approach might be made to lead to the same objectives. So a compromise was denied; S. 2413 was dropped; and S. 2731, arresting "the running of all statutes of limitation applicable to the violation of the antitrust laws * * * no indictment or civil proceeding"[14] was put in its place, passed by two houses, and approved by the President. Its general language, reflecting legislative deliberation as just recited, is written in terms as broad as the right to sue set down in the antitrust acts.[15] Its attention had been fully called to the hazard to the war effort presented by the triple damage action; and, had the Congress been of a mind to exclude the private

---

[13]Ibid., page 38.

[14]56 Stat. 781 (1942), as amended, Public Law 107, Act of June 30, 1945, C. 213, 79th Congress, 1st Session.

[15]Sen. Rep. 1592, 77th Cong. 2nd Session (1942); H.R. Rep. No. 2480, 77th Cong. 2nd Session (1942). The language in both reports is identical.

antitrust suit from the moratorium, it was quite capable of finding the proper words.

The respondents are quite correct in stating that the Congress has passed an Act establishing a moratorium on statutes of limitation in respect to frauds upon the government. And it is true that at one time it was proposed to amend the fraud bill (H.R. 6484) to comprehend antitrust violations as well. But the fact is that the Congress refused to so amend, and insisted upon writing a separate Act for antitrust is significant.[16] In respect to the security for which the war contracts asked, the Act as passed (S. 2731) gave virtually the same security as the War-Navy sponsored bill, S. 2413. Its plain and obvious meaning is in strict accord with the intent of the Congress as revealed in the legislative history.

The defects in the contentions of the respondents are manifest. They make no reference to S. 2413, which provoked debate and led to the statement of legislative intent. They are right in saying that the gentlemen's agreement applied only to government suits; they are wrong in failing to note that the legislative act is "complementary to" and not an underwriting of, the informal understanding. They stress the advantage to the Department of Justice in having a "longer time"; but seem to conclude that in some way such an advantage is not accorded a private suiter. A number of the fragments which they present as legislative history are true enough. The bother is that, torn

---

[16]Counsel assert a parallelism between H.R. 6486, the fraud statute, and S. 2731, the antitrust statute, and argue that since the fraud statute is clearly limited to suits brought by the government, it follows that the antitrust statute is so limited. For the argument the parallel is a very unfortunate one. In respect to frauds against the government, the private action goes far back in legal history. It has found expression in a Congressional statute, conferring upon the person who discovers the fraud the right to sue. In fact, the private party is permitted to bring suit in the name of the United States. 18 U.S.C.A. Sections 80, 82-86; 31 U.S.C.A. 231-234. Standing to sue in such a case has recently been accorded full recognition by the United States Supreme Court. *U. S. ex rel. Marcus v. Hess,* 317 U.S. 537. The same usage, beaten into its modern statutory form, finds expression in the triple damage antitrust action.

from the whole story, they give a distorted picture. And together they fall short of providing that in applying the moratorium to all violations of antitrust laws, now indictable or subject to civil proceeding, the Congress did not mean what it said.

3. THE RATIONALE OF THE STATUTE COMPELS THE CONCLUSION THAT IT WAS INTENDED TO ARREST ALL ANTITRUST SUITS, PUBLIC AND PRIVATE, FOR THE DURATION OF THE WAR.

The statute of limitations is not of great importance in suits brought by the government. It is only on rare occasions that the Department of Justice finds it necessary to consider it. The government, unlike a private corporation, does not go out of business. The violators of the antitrust laws do not usually revise their patterns of trade-practice or amend their restraining ways except as a result of, or to prevent, court action. If it does not institute a criminal prosecution at a particular time, the situation usually invites it—with no bar by the statute of limitations when the government is ready to act. The great majority of its cases are, however, not criminal actions, but suits in equity. And equity addressed to the future, aims at injunctive relief against wrongs which are current. It considers the past only as a method of analysis and discovery—to reveal the nature and magnitude of the "wrongs" against which relief is sought. In criminal suits, the government needs little protection against the running of a statute of limitations. In respect to civil actions it needs none whatsoever. It is to be assumed that when the Congress decreed that the moratorium applied to "civil proceedings" it was issuing a command, not uttering meaningless words. It would have to apply to private actions, or "it would have no application."

For in respect to private antitrust actions, the statute is of utmost consequence. The private person cannot institute a criminal prosecution. He can, and often does, resort to equity, in seeking security against the wrongful conduct of which he complains. But his principal demand is compensation for the injury already done to him. The action in equity by a private party is

usually grafted upon the suit for damages. In fact, it is in respect to this private suit for triple damages that the statute of limitations has its practical field of use. Outside of this field, its employment is highly exceptional.

The private party, unlike the government, cannot adopt a policy of watchful waiting, allow the wrongdoing to continue with impunity, and strike when it is ready to do so. It must sue in respect to its own injury. That injury may be a mortal blow which puts it completely out of business. The statute of limitations measures the period of time within which, after the last injury, suit must be instituted. It is here and here alone that the running of the statute of limitations is a hazard to action. It is in respect to the private suit for damage, and only in respect to such a suit that the moratorium statute can give any practical relief. To make the moratorium statute apply to suits in equity by the government—where it has no application—and to deny it application to the private suit for damages—where alone it can give any relief—is making irony a dominant factor in statutory interpretation.

Here the argument of counsel is further vitiated by a misconception of the character and function of the suit for triple damage. This private suit is the oldest and best established of the causes of action through which the substantive law against restraints and monopolies is enforced. As long ago as 1623, it was lifted from the common law into the Statute of Monopolies, and from that classic document carried over directly into the Sherman Act. Its roots go back to the use of the informer, who was permitted—and induced—to take to the law to vindicate the public interest. The award of triple damage does not—and never was intended to—constitute a windfall to the successful litigant; it was set up as an inducement to private persons to bring to the attention of the courts breaches of the antitrust laws which were manifests of public policy. The course was taken off the action by the informer through making it a condition of such an action that the plaintiff was to sue because of an injury

to him in property or business. The provisions in the Sherman and Clayton acts which establish the injured individuals which invite such actions, go no further than establish standing to sue.[17] The causes of action are exactly the same as those for which the government institutes criminal proceedings or resorts to equity. In antitrust there is one single body of substantive law, towards the enforcement of which the Congress has equipped both the government and the individual with appropriate remedies. Like the government, the injured individual may bring his suit "by reason of anything forbidden in the antitrust laws." The public character of the private suit has sometimes been overlooked by lawyers and judges whose experience has been largely in the field of private law. But the history, the intent of the Congress, and the rationale of the suit for triple damages are all clear. In bringing his action, the injured individual is an instrument of law enforcement; in seeking redress for his own grievance, he is helping to vindicate a wrong against the public.

And, if instead of considering the plaintiff, we look at it from the standpoint of the actual or potential defendant, the conclusion is equally clear. The moratorium statute was passed as a compromise between what the military wanted and what the Congress was willing to grant. The military was transmitting the pressures put upon it by manufacturers—the great number being "big business"—who were reluctant to become war contractors unless they could be given adequate security against the harassment of antitrust suits. In respect to the government such protection had already been given by the gentlemen's agreement. Nor, in all save the exceptional case, did the government require any statute of limitations to protect its opportunity of future action. *If an antitrust suit harasses, it harasses whether the plaintiff is the government or an individual. It is a task of the first magnitude to defend an antitrust suit, that task is not les-*

[17]Section 7 of the Sherman Act, Section 4 of the Clayton Act, U.S.C. Sec. 15.

sened because of the public or private character of the complainant. If there is a threat to the defendant's business in such a suit, it lies in the private action. The criminal prosecution results in a small fine; the decree of equity is only an injunction to good works. The real teeth in the antitrust laws is the tripling of damage for injury done, an assessment which can run into very large figures. And, whereas the government usually brings only a single action—though occasionally it may resort both to criminal prosecution and civil procedure—a pattern of illegal practice is likely to injure many parties, and the defendant as a consequence to be exposed to a multiplicity of suits. It just does not make sense that the Congress would protect war contractors against a lesser danger, when protection against such danger had already been secured, and leave them at the mercy of the greater danger. The rationale of the moratorium act makes clear its coverage of all actions, civil and criminal, public or private for violations of the antitrust laws. Thus from whatever angle one looks at it, the conclusion is inescapable. The rulings of the Supreme Court on similar statutes, the accepted methods of statutory interpretation, the legislative history of the measure, and the rationale of the statute, all unite to indicate that Congress meant exactly what it said; that "the running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, now indictable or subject to civil proceedings under any existing statute "shall be suspended" until June 30, 1946.

Therefore, to sum up the questions as to the Statute and its applicability hereto:

If the claim of appellants that the statute cannot be urged on these motions, or if the conspiracy of 1929 is a continuing conspiracy as urged, or if the statute does not begin to run until the completion of the last overt act, the statute becomes of no moment herein and the cause must be reversed; BUT if no one of such three possibilities above set forth is held to be applicable, the question of the Moratorium arises. In such event,

appellants contend that on all wrongs occurring during the Moratorium period, the statute did not begin to run until June 30, 1946—the terminating period of the Moratorium—and on those overt acts prior to the enactment of the Moratorium (October 10, 1942), the statute was stayed during the period of its effectiveness.

CONCLUSION

Appellants submit that the judgment of the lower Court should be reversed for the following reasons:

1. The lower Court erred in permitting the plea of the Statute of Limitations in the face of Rule 8(c), and in holding that "no cause of action lies by reason of the bar of the applicability of the California Statute of Limitations" (R. 621). Rule 8(c) is plain and clear and means just what it states and such Court had no right to ignore it. It stands unchallenged, is the law of the land, and should, we respectfully contend, be applied here in order to do justice to appellants. While such point has never been, so far as we are advised, passed upon by the Supreme Court, other than by its adoption of the Rule, such Court did approve the Rules including 8(c) and we respectfully submit that until such Court rules otherwise, such Rule should be observed as written. This does not mean that appellees will be precluded from asserting such plea, for it can be urged by them in their responsive pleading, namely, their answers, and the question could then be presented on the trial of the cause.

2. The same contentions urged as to the Statute of Limitations are applicable to the questions of "release," and the Court grievously erred in accepting, discussing and passing upon such plea on these motions, all in violation of the provisions of Rule 8(c). Furthermore, the Court passed upon *questions of fact* concerning such "releases" and thus violated the rulings of all Federal courts prohibiting such rulings on motions of this character.

3. Such Court erred in passing and ruling upon various other *fact issues* presented by the affidavits filed in support of the

motions presented by appellees, some of which instances are set forth on pages 48 to 52, inclusive, of our Opening Brief. Appellants have set forth in their Opening and in this Reply Brief many authorities holding with their contention on this point and to which we respectfully refer. Illustrations of such activities on the part of the lower Court appear on pages 50-52, inclusive, of our Opening Brief. As soon as the affidavits disclosed that such questions of fact were presented the motions to dismiss should have been denied as stated in *Frederick Hart & Co. v. Recordgraph Corp.,* 169 Fed.(2) 580, at p. 583.

4. The lower Court erred in holding (R. 621) that no cause of action lies herein "by reason of the failure of the complaint to state a claim upon which relief may be granted." The salient portions of the complaint are set forth in our Opening Brief and do, we submit, allege a cause of action that comes within the rule of *Stevens Co. v. Foster & Kleiser* and other authorities cited on page 46 of our Opening Brief. It is impossible to conceive how the lower Court could have made such a ruling in the face of the admitted allegations of the complaint which set forth a most vicious and determined plan and conspiracy to destroy these appellants; also the activities of appellees thereunder and of the specific wrongs and damages suffered by appellants as a result of appellees' activities. We respectfully request a reading of the complaint as set forth in our Opening Brief, for we feel assured that no party can do so without indignation arising within him that such conditions could exist in this country. Especially is this so in the face of the admissions of appellees as described with particularity in our Opening at pages 40 to 44, inclusive, and to which we respectfully request the attention of this Court; we call especial attention to Paragraphs 7, 8 and 10 of such admissions. Appellees admit the allegations of the complaint in its entirety and figuratively laugh at the antitrust laws of the land by the motions and pleas which the lower Court allowed them to advance. In this connection, we refer again to the case of *Albert Pick-Barth v. Mitchell,* cited on page 58 of our Opening.

5. The lower Court failed to pass upon the question of the Moratorium, referred to on page 61 of our Opening Brief. It also erred in failing to find that such Moratorium was applicable hereto, in part at least, and tolled the Statute of Limitations. On pages 615 and 616 of the Record, the lower Court in its decision refers to the Moratorium but makes no further reference or ruling.

6. The lower Court erred in refusing the application of appellants to amend its judgment to the extent of allowing appellants to file motions to amend their complaint.

7. Such Court erred in its ruling on other points involved and indicated in the two briefs of appellants.

Respectfully submitted,

THURMAN ARNOLD,
1200 Eighteenth St., N. W.,
Washington 6, D. C.,

FRANK BUREN,
2466 East 56th Street,
Los Angeles 11, Calif.,

STERLING CARR,
One Montgomery Street,
San Francisco 4, Calif.,

Attorney for Appellants.

August 22, 1949.